Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

October Term, 1997

LANE S. HOWELL,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari
To The United States Court of Appeals
For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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54 pp

QUESTION PRESENTED

Whether a 100% trust fund penalty can be imposed under 26 U.S.C. § 6672 on an individual who was not a corporate officer during the relevant tax period merely because he becomes a corporate officer before the tax payment is due and fails to use income acquired after he becomes an officer to pay the corporate delinquency.

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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OPINIONS BELOW

The opinion of the Court of Appeals issued in support of its judgment is unpublished but is reported as *Stettler v. United States*, 1998 U.S. App. LEXIS 504, 98-1 U.S. Tax Cas. (CCH) P50,136 81 A.F.T.R.2d 434 (P-H) (10th Cir. 1998), and is reprinted in Appendix A.

The opinion of the District Court is unpublished but is reported as *Stettler v. United States*, 1996 U.S. Dist. LEXIS 17948, 97-1 U.S. Tax Cas. (CCH) P50,107, 78 A.F.T.R.2d (P-H) 7484, and is reprinted in Appendix B.

JURISDICTION

The opinion of the Court of Appeals in this case was filed on January 13, 1998. This petition is therefore timely under this Court's Rule 13.1.

This Court has jurisdiction to review the judgment of the Court of Appeals pursuant to 28 U.S.C. Section 1254(1).

STATUTORY PROVISION INVOLVED

Any person required to collect, truthfully account for, and pay over any tax imposed by this title who willfully fails to collect such tax, or truthfully account for and pay over such tax, or willfully attempts in any manner to evade or defeat any such tax or the payment thereof, shall, in addition to other penalties provided by law, be liable to a penalty equal to the total amount of tax evaded, or not collected, or not accounted for and paid over.

26 U.S.C. § 6672(a).

STATEMENT OF THE CASE

Howell was a consultant to Bonnevest, Inc. during the period of January 1990 through February 1992. B-9.[1] Northern Outfitters, Inc. ("Northern") was a related company to Bonnevest. *Id.* At all relevant times, John Dunlop was the majority shareholder in both Bonnevest and Northern. A-4.

Howell served as president of Northern from February through May of 1990. B-9. There were no outstanding tax liabilities when Howell concluded his term as Northern's president. A-5.

David Stettler succeeded Howell as president of Northern but left the company in December 1990. A-5. During the fourth quarter of 1990, Northern failed to withhold FICA contributions and federal income taxes from its employees' wages and/or to remit the same to the Internal Revenue Service ("IRS"). B-5. Additionally, no funds were carried over from the fourth quarter of 1990 into 1991 in order to discharge the payroll tax liability. A-5 & 6.

Sometime in January 1991, Howell again assumed the duties of Northern's president. A-5. Northern filed its Form 941 for the fourth quarter of 1990 when due on January 31, 1991, but made no payment. B-9. By April 1991, Northern's financial condition had deteriorated to the point that the company elected to file a Chapter 11 petition. A-5. Howell continued as Northern's president until February 1992, at which time he also parted company with Bonnevest. *Id.* During

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1. "A" and "B" references refer to pages of the Appendices of this Petition.

Howell's second term as president, payroll taxes were kept current and payments totaling over $40,000 were made toward the fourth quarter 1990 arrearage from after-acquired funds. *Id.*

The IRS made 100% penalty assessments against Stettler, Dunlop, and Howell under 26 U.S.C. § 6672 for willful failure to collect, truthfully account for, or pay over the withholding tax liabilities of Northern for the fourth quarter of 1990. A-4, B-6. Stettler paid $5000 of the assessment and submitted a refund claim which was denied. A-4. Stettler and his wife then filed this refund suit in federal district court. *Id.* The United States filed counterclaims against him and filed third party complaints against Dunlop and Howell. *Id.* All claims against Dunlop and Settler were disposed of by stipulation. *Id.*

Howell moved for summary judgment asserting that he was not liable for the 100% penalty because he was not a "responsible person" for the purposes of a trust fund recovery penalty under § 6672, nor did he "wilfully" fail to comply as to the fourth quarter of 1990. The district court concluded that Howell was a responsible party because he had authority to pay on January 31, 1991 when the taxes were required to be paid. B-8 through B-10. The court also concluded Howell was willful because he directed payments to suppliers and other creditors in January 1991. B-10 & 11. The district court granted summary judgment for the United States on November 14, 1996 (B-11) and entered final judgment on November 18, 1996 (B-12).

Howell timely appealed to the Court of Appeals raising again the issues of responsibility and willfulness. A-6. The Court of Appeals had jurisdiction over the final decision of the

district court pursuant to 28 U.S.C. § 1291.[2] The Court of Appeals affirmed on the same grounds as stated by the district court.

Howell timely files this Petition for Writ of Certiorari with this honorable Court.

REASONS FOR GRANTING THE WRIT

This case involves the imposition of the 100% trust fund penalty provision of 26 U.S.C. § 6672. Section 6672 imposes a personal tax liability upon persons responsible for the collection and payment of employment taxes when those taxes are willfully not collected and paid to the IRS by the employer. A tax Form 941 is required to be filed by the end of the month subsequent to each calendar quarter along with the tax payment for that quarter.

The application of § 6672 is controlled by this Court's precedent of *Slodov v. United States*, 436 U.S. 238 (1978). Despite uniform application of *Slodov* for twenty years, the Tenth Circuit has distinguished the factual peculiarity that Slodov became a responsible person on the same day the return was due, January 31st, and held *Slodov* inapplicable to cases where a taxpayer becomes a responsible person between the end of the tax quarter and the filing date.

While no appellate case addresses these exact facts, the Tenth Circuit's opinion conflicts with the rationale of *Slodov*. Furthermore, it conflicts with published decisions of the Third,

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2. The Court of Appeals mistakenly asserted jurisdiction under 18 U.S.C. § 158(d). A-3 & 4.

Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits which discuss *Slodov* in response to arguments relative to the date a person becomes responsible or willful. Finally, in a case on all fours, the District Court for the Northern District of New York has held *Slodov* applicable where a taxpayer became a responsible person between the end of the tax quarter and the filing date for that quarter.

Petitioner argues that the Tenth Circuit has erroneously distinguished this Court's precedent. Assuming arguendo that the Tenth Circuit's distinguishing of *Slodov* was meritorious, this case would raise an important federal question which has not been settled by this Court. The Tenth Circuit's decision is contrary to the rationale of *Slodov*, and every Court of Appeals to examine the issue.

Whether *Slodov* is distinguishable or not, this Court should grant certiorari to settle the question of how to apply § 6672 to a taxpayer who becomes a responsible party after the tax quarter has ended but before the tax return is due.

ARGUMENT

A 100% TRUST FUND PENALTY CANNOT BE IMPOSED UNDER 26 U.S.C. § 6672 ON AN INDIVIDUAL WHO WAS NOT A CORPORATE OFFICER DURING THE RELEVANT TAX PERIOD MERELY BECAUSE HE BECOMES A CORPORATE OFFICER BEFORE THE TAX PAYMENT IS DUE AND HE FAILS TO USE INCOME ACQUIRED AFTER HE BECAME AN OFFICER TO PAY THE CORPORATE DELINQUENCY.

An officer or employee of a corporation who is responsible

for the collection of employment taxes from the pay due an employee may be assessed a penalty equal to the amount of the taxes ("100% penalty") if he willfully fails to account for and pay over the amount due to the United States. 26 U.S.C. § 6672. The Tenth Circuit affirmed the summary finding of liability on the part of Howell who became president of Northern after the quarter in which the tax liability arose, but before the filing and payment date of those taxes, because he failed to use monies received after he became president to pay the tax liability. In doing so, the Tenth Circuit distinguished *Slodov v. United States*, 436 U.S. 238 (1978), holding its rationale inapplicable under these facts. This was error. Under the holding of *Slodov*, if dispositive, or the rationale of *Slodov*, if distinguishable, the liability imposed upon Howell is impermissible.

This question turns upon the application of *Slodov*. Slodov acquired control of three companies on January 31, 1969 which had $250,000 in trust taxes payable the same day for the fourth quarter 1968. *Slodov*, 436 U.S. at 241. On February 1, 1969, after being assured that funds existed to pay the debt, Slodov mailed corporate checks to the IRS. *Id.* On February 3, 1969, Slodov discovered that the corporate accounts were overdrawn and stopped payments on the checks. *Slodov*, 436 U.S. at 242. Slodov immediately advised the IRS and managed to pay current taxes until bankruptcy was declared on July 15, 1969. *Id.*

After Slodov took control, the companies earned sufficient gross receipts to pay the past due taxes, but the monies were used for other purposes. The United States argued that the

"sums received from sales in carrying on the businesses

> after January 31, 1969, were impressed with a trust in favor of the United States for the satisfaction of overdue employment taxes, and [Slodov's] willful use of those funds to pay creditors other than the United States, violated the obligation to "pay over" imposed by § 6672."

Slodov, 436 U.S. at 251.

This Court rejected the United States' argument on three bases (1) no well-counseled person would attempt to save a company unless it already had sufficient monies to pay all tax delinquencies, which would discourage changes of ownership without encouraging compliance with the tax code, *Slodov*, 436 U.S. at 251-53; (2) such an interpretation would make responsible persons assuming control of a business a guarantor for payment of the delinquent tax debt without fault, contrary to the history and context of § 6672, *Slodov*, 436 U.S. at 253-55; and (3) the trust imposed by § 6672 cannot be read as establishing any fiduciary duty to pay over "after-acquired" monies unrelated to the withholding taxes, *Slodov*, 436 U.S. at 255-56. The Court also made clear, however, that when the "responsible person" at the time of payment is the same person who caused the delinquency during the tax quarter, there is no question but that § 6672 applies. *Slodov, 436 U.S. at 245-46.*

The Court concluded:

> We hold that a "responsible person" under § 6672 may violate the "pay over" requirement of that statute by willfully failing to pay over trust funds collected prior to his accession to control when at the time he assumed control the corporation has funds impressed with a trust

> under § 7501, but that §7501 does not impress a trust on after-acquired funds, and that the responsible person consequently does not violate § 6672 by willfully using employer funds for purposes other than satisfaction of the trust-fund tax claims of the United States when at the time he assumed control there was no funds with which to satisfy the tax obligation and the funds thereafter generated are not directly traceable to collected taxes referred to by that statute.

Slodov, 436 U.S. at 259-60.

Because the Tenth Circuit distinguished the facts in *Slodov*, it is important to keep in mind the chronology related to trust fund taxes. Employers are required to deduct FICA and income taxes from their employee's income as they pay them during each tax quarter. At the end of the month following each calender quarter, a tax Form 941 and the taxes withheld for the quarter are required to be filed and paid. So in this case, as in *Slodov*, the final quarterly accounting and payment were due for the fourth quarter of the preceding year on January 31st.

Slodov did not become a corporate officer until January 31, 1969, which obviously is also the day the Form 941 and fourth quarter taxes were required to be filed and paid. Based on this peculiar fact, the Tenth Circuit distinguished *Slodov's* in three key respects: it held that (1) no delinquency for trust funds existed when Howell became president because such delinquency doesn't arise until the taxes must be paid (A-9 & 10); therefore, (2) Howell was not "new management" because he became a corporate officer before January 31st (A-10); and (3) the funds acquired after Howell became an officer were not "after-acquired funds" because they were acquired "in time to

avoid delinquency" on January 31st (*Id.*).[3]

The Tenth Circuit's distinction rests on the erroneous rationale that the importance attributed to January 31st by the *Slodov* Court was that returns were due to be filed and taxes paid on that date, rather than that being the date Slodov became a corporate officer. This rationale is erroneous because it is contrary to (1) the plain language of *Slodov*; (2) the uniform precedents of the Courts of Appeal; and (3) the underlying rationale of *Slodov*. Petitioner makes these arguments in turn.

I. Opinion Below Is Contrary to the Plain Language of *Slodov*.

The language of *Slodov* is exceptionally clear. In framing the issue, the Court said:

> The corporations were indebted at the time of the purchase for approximately $250,000 of taxes . . . withheld from employees prior to January 31.

Slodov, 436 U.S. at 240. Since the case concerns taxes due for

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3. The Tenth Circuit also states that there was a cash balance of over $27,000 on December 31, 1990 and that $93,000 was deposited in Northern's checking account during January 1991. Neither of these facts show what funds were in Northern's possession on the day that Howell became president, nor controvert his assertion that no funds were available when he became president to pay the trust fund taxes. Remand to the district court for trial on this disputed fact question is unnecessary because, under *Slodov*, Howell can only be held personal liable to the extent that trust funds were available when he became president. Under any view of the facts, the $40,000 paid toward the arrearages by Howell would subsume whatever monies were available on that date, if any.

the payment of wages during the fourth quarter of the preceding year, the court's reference to January 31 can only have meaning as signifying the date Slodov purchased the corporations. Continuing:

> The sums withheld had not been paid over when due, however, but had been dissipated by previous management before petitioner acquired the business.

Id. Since, factually, the taxes did not have to be paid until after Slodov had purchased the corporations — albeit later the same day — the important fact here must be that all funds were dissipated when Slodov took over. This conclusion is made perfectly clear by the Court's reference to Slodov's acquisition. If the Court meant what the Tenth Circuit assumed, it would have said "but had been dissipated by the due date." Continuing:

> After petitioner assumed control, the corporations acquired funds sufficient to pay the taxes, but petitioner used the funds to pay employees' wages, rent, suppliers and other creditors, and to meet other day-to-day expenses incurred in operating the businesses.

Id. Nothing distinguishable here. Concluding:

> The question to be decided is whether, in these circumstances, petitioner is personally liable under § 6672 . . . for the corporations' unpaid taxes withheld from wages prior to his assumption of control.

Slodov, 436 U.S. at 240-41. The question framed repeatedly refers to whether Slodov had any liability for conduct prior to

his control.

The Court's discussion does not lend any support to the Tenth Circuit's rationale. In framing the decision's application, the Court said:

> When the same individual or individuals who caused the delinquency in any tax quarter are also the "responsible persons" at the time the Government's efforts to collect from the employer have failed, and it seeks recourse against the "responsible employees" . . . there is no question that § 6672 is applicable to them. It is the situation that arises when there has been a change of control of the employer enterprise, here corporations, prior to the expiration of a tax quarter, or at a time when a tax delinquency for past quarters already exist that creates the question for our decision.

Slodov, 436 U.S. at 245-46. It is inherently clear that the Court did not consider the filing and payment date relevant because its determination of possible applications of § 6672 all focused on change of control, either (1) no change, (2) change during the tax quarter, or (3) change after delinquency for tax quarter exists. It is only reasonable to assume that the latter is equivalent to change after the end of the tax quarter for two reasons. First, if it meant after January 31st, as the Tenth Circuit suggests, then a fourth application would arise for the time period of January 1 through January 30 which the Supreme Court did not specify.

Second, such an analysis would be contrary to the well settled rule of law that the "tax liability of the employer arises when the wages are paid, rather than on the due date of the tax

return." *Kadah v. United States*, 600 F.Supp. 1302, 1308 (N.D. N.Y. 1985). *See also*, *Davis v. United States*, 961 F.2d 867, 876 (9th Cir. 1992) ("The arrival of the payment date, after all, does not by itself impose liability. It simply marks the fruition of liability — that is, responsibility — accumulated throughout the quarter as salaries were paid and/or trust funds dissipated."); *United States v. DeBeradinis*, 395 F.Supp. 944, 951 (D. Conn. 1975) ("The obligation of a responsible officer arises at the time the taxes are withheld from wages, not at some subsequent time when payment is due or the return is to be filed."), *aff'd mem.*, 538 F.2d 315 (2nd Cir. 1976); *Jones v. United States*, 60 F.3d 584, 588 (9th Cir. 1995) ("Responsible person" status is determined, under these authorities, when the employees are paid, not when the withheld taxes should have been deposited or become payable.").

The Tenth Circuit has strained the word "delinquency" to a meaning not justified by this Court's use in *Slodov* to avoid applying this Court's clear precedent. This refusal to apply the Court's precedent justifies the granting of a writ of certiorari so that this Court may clarify *Slodov's* application to the instant facts.

II. Opinion Below Is Contrary to Appellate Precedents.

All appellate decisions discussing *Slodov* relative to the date a taxpayer became responsible or willful analyze it under facts divergent from the instant facts: the individual was a corporate officer during the tax quarter, became a corporate officer during the tax quarter, or had sufficient funds available to pay the tax when they became responsible. In response to the arguments raised, however, these cases discuss the January 31st date in *Slodov* as having importance because it was the date Slodov

became an officer, not because the taxes were due on that date.

In *Mazo v. United States*, 591 F.2d 1151, 1152 (5th Cir. 1979), corporate officers who were officers both when the tax liability arose and when required to be paid argued they had no genuine authority and therefore was not responsible or willful under § 6672. Recognizing *Slodov* controlled the application of § 6672, the Fifth Circuit said:

> [*Slodov*] held that funds collected by the corporation **after a change in corporate control** are not impressed with a trust for taxes withheld during a prior regime unless those funds are directly traceable to dissipated trust funds; failure to use such later acquired funds to pay federal withholding taxes does not constitute a violation of the § 6672 requirement that the responsible person "pay over" withholding taxes . . . The orthodontist in *Slodov* was not subject to a § 6672 penalty because the funds he acquired **after his accession to control** were not subject to a trust, and his duty as a person assuming corporate control with respect to the accrued withholding tax liability was limited to paying any trust funds directly traceable to those trust funds that had been dissipated.

Mazo, 591 F.2d at 1153-54 (emphasis added). *See also*, *Garsky v. United States*, 600 F.2d 86 (7th Cir. 1979) (same).

In *Kizzier v. United States*, 598 F.2d 1128, 1134 (8th Cir. 1979), a corporate officer who was an officer both when the tax liability arose and when required to be paid argued that he was neither responsible or willful under § 6672. Applying *Slodov* the Eight Circuit said:

> Prior to Slodov's assumption of control, taxes withheld by the corporations from their employees' wages had not been remitted to the Government, but had been dissipated by the corporations' previous management . . . [B]ecause Slodov became a responsible person After the corporations' tax liability accrued and After funds available to satisfy that liability had been dissipated, the Court held that Slodov could not be compelled to pay the tax debt of the corporations' prior regime out of **funds acquired after his assumption of control** which were not traceable to trust funds which the prior regime first withheld and then **dissipated before Slodov became a corporate owner.**

Kizzier, 598 F.2d at 1133-34 (emphasis added).

In *United States v. Vespe*, 868 F.2d 1328, 1334 (3rd Cir. 1989), the United States sought judgment n.o.v. arguing that a responsible party both when the tax liability arose and when required to be paid was willful. Discussing the application of *Slodov*, the Third Circuit said:

> n7 In *[Slodov]* the Supreme Court considered whether an individual could be held liable under section 6672 for employment taxes incurred prior to his assumption of control, where the withheld sums had been dissipated by the previous management. The Court rejected the proposition that all cash received by the corporation after Slodov assumed control was impressed with a trust in favor of the United States to satisfy the unpaid taxes. *436 U.S. at 251, 254-56.* In doing so, it noted that
>
> The language of § 7501 limits the trust to "the

> amount of the taxes withheld or collected." Comparing that language with § 6672, which imposes liability for a willful failure to collect as well as failure to pay over, makes clear that under § 7501 there must be a nexus between the funds collected and the trust created.
>
> *Id. at 256.* The Court concluded that Slodov could only be held liable for failing to pay over funds generated after he assumed control which were directly traceable to taxes collected under section 6672. *Id. at 259-60.*

Vespe, 868 F.2d at 1334, n.7.

In *Davis*, 961 F.2d at 870, a corporate officer who was an officer both when the tax liability arose and when required to be paid argued that he was not willful because he was unaware the taxes were delinquent until after the money was overdue and the collected funds were dissipated. Applying *Slodov*, the Ninth Circuit said:

> The Supreme Court held in *Slodov* that, if new management of a corporation assumes control when a delinquency for trust fund taxes already exists and the withheld taxes have already been dissipated by prior management, the new management's use of after-acquired revenues to satisfy creditors other than the United States does not make it personally liable for a section 6672 penalty. *436 U.S. at 259-60.*
>
> . . .
>
> Davis counters that simply being responsible is not enough. He points out that Mr. Slodov was a corporate officer as of January 31, 1969 — the day that the

> payments for the last quarter of 1968 were due. Status as a responsible person, however, does not attach automatically to every officer engaged in fiscal management on the day the check must be written. Rather, liability as a responsible person attaches each time salaries are paid during the course of the quarter. "As the employer withholds taxes from the employee, a contingent liability is created. The liability merely becomes fixed on the date when the payments are due."

Davis, 961 F.2d at 871-73 (emphasis added).

In *Honey v. United States*, 963 F.2d 1083, 1088 (8th Cir. 1992), two corporate officers who were officers both when the tax liability arose and when required to be paid argued that under *Slodov* "they are only liable to the extent of the unencumbered funds in existence on October 31, 1985,[4] and not for any funds acquired [after that date]." Applying *Slodov*, the Eighth Circuit said:

> In *Elmore v. United States*, we applied *Slodov* and found that at the time Elmore simultaneously became both responsible and willful, the corporation's bank balance was positive but was encumbered by outstanding checks written prior to the time Elmore became both responsible and willful, and thus Elmore was not liable under § 6672. *Elmore*, 843 F.2d 1128, 1133 (8th Cir. 1988). In *Kenagy v. United States*, we expanded upon this point:
>
> **A responsible person generally may not be**

4. The filing and payment date for third quarter taxes.

> **penalized with respect to unpaid taxes accruing prior to the date s/he became a responsible person in an amount more than the unencumbered funds of the corporation in existence at that date**. Unencumbered funds are those funds available after taking into account outstanding transactions.

Kenagy, 942 F.2d 459, 465 (8th Cir. 1991) (citing *Slodov* and *Elmore*).

However, the facts of *Slodov*, *Elmore*, and *Kenagy* are distinguishable from the facts of this case. **Those cases look to the point in time at which the taxpayer became a responsible person and look to whether there were unencumbered funds available as of that date to pay the tax liability accrued prior to the time the taxpayer became a responsible party**.

Honey, 963 F.2d at 1088 (emphasis added).

In *Denbo v. United States*, 988 F.2d 1029, 1031 (10th Cir. 1993), a corporate officer who was an officer both when the tax liability arose and when required to be paid argued that he was not willful because he relied on another officer's statements that the taxes were being paid. Applying *Slodov*, the Tenth Circuit said:

> In *Slodov*, the Court held that, if new management of a corporation assumes control when a delinquency for trust fund taxes already exists and the withheld taxes have already been dissipated by prior management, the new management's use of after-acquired revenues to

> satisfy creditors other than the United States does not make it personally liable for a section 6672 penalty. *Slodov, 436 U.S. at 259-60.* **The Court found the tax code's language and legislative history inconsistent with a penalty theory that imposed "liability without personal fault."** *Id. at 254.* After-acquired funds, the Court continued, were not automatically impressed with a trust for the benefit of the government. *Id.* **Rather, some "nexus between the funds collected and trust created" must be established**. *Id at 256.*

Denbo, 988 F.2d at 1035 (emphasis added). *See also*, *Muck v. United States*, 3 F.3d 1378, 1381 (10th Cir. 1993) (same).

In *Barnett v. United States*, 988 F.2d 1449, 1458 (5th Cir. 1993), a corporate officer who was an officer both when the tax liability arose and when required to be paid argued that there was a change in corporate control when he moved from vice-president to president of the corporation. Applying *Slodov,* the Fifth Circuit said:

> In *Slodov*, the Court held that the Government could not hold a person accountable under § 6672 if the only company **funds available were funds acquired after the party assumed responsible person status within the corporation**.

Id. (emphasis added). *See also*, *Wood v. United States*, 808 F.2d 411, 415-16 (8th Cir. 1987) ("the United States Supreme Court held that a responsible person does not act willfully in paying other creditors when the tax liability accrued prior to the person's becoming a responsible person.").

In *Kinnie v. United States*, 994 F.2d 279, 284 (6th Cir. 1993), a corporate officer who was an officer both when the tax liability arose and when required to be paid argued he was not liable until he became aware of the tax delinquencies. Applying *Slodov,* the Sixth Circuit said:

> In *Slodov*, the Supreme Court held that a trust to pay preexisting tax liabilities could not be imposed on all cash received by the corporation after the taxpayer assumed control of the corporation and after he became responsible and willful under section 6672 . . . [In prior appellate cases where the taxpayer was the "responsible person" when the "tax delinquency accrued"] *Slodov* was distinguished on the basis that in *Slodov*, the responsible person did not become responsible until after the time during which the tax delinquency accrued.

Id. See also, *Cline v. United States*, 997 F.2d 191, 195 (6th Cir. 1993) ("The Supreme Court held in *Slodov* that if a person first assumes control of a corporation at a time when trust taxes remain unpaid, that person is responsible for the existing delinquency to the extent the corporation has funds available with which to satisfy the tax obligation.").

In *Purdy Company v. United States*, 814 F.2d 1183, 1189 (7th Cir. 1987), the court discussed the application of *Slodov* to the question of whether a taxpayer may be held liable for third quarter withholding taxes, as well as for that portion of the fourth quarter taxes which had accrued prior to November 18 when the taxpayer assumed control. In its thorough discussion, the Seventh Circuit said:

> *Slodov* **emphasizes as a critical consideration** whether

> the failing corporation had "funds," "liquid assets," or "cash" on hand when the responsible person assumed control of the employer enterprise.

Purdy, 814 F.2d at 1190 (emphasis added, citations omitted). Concluding its analysis, the court said:

> It is enough for the present purposes to rely upon the *Slodov* principle that a new person in control of a failing enterprise may be personally responsible for past withholding tax delinquencies to the extent that the employer corporation had "funds" or "liquid assets" at the time of the transfer of control.

Purdy, 814 F.2d at 1191.

In *Thibodeau v. United States*, 828 F.2d 1499, 1506 (11th Cir. 1987), the court considered, *inter alia*, the application of *Slodov* to the liability of a taxpayer who became a responsible party in January 1973 relative to fourth quarter 1972 taxes. Under the facts, the court held that

> the January, 1973 payment was consistent with *Slodov*, which requires that previously acquired funds be used to pay off the delinquency. The taxpayer did not argue that the taxes were paid with after acquired funds.

Thibodeau, 828 F.2d at 1506.

Petitioner is aware of only one case on all fours with the facts of the instant matter. In *Kadah*, 600 F.Supp. at 1303, a person who became a corporate officer "early in October 1976" filed a suit for refund of the 100% penalty assessment he paid

for, *inter alia*, the third quarter of 1976. Discussing Kadah's liability for the third quarter taxes, which accrued before he became an officer but which were not required to be paid until after, the court said:

> [P]laintiff could not have become a responsible person until he began directing the business of the corporation in October. The only exception is the holding that
>
> > a "responsible person" under § 6672 may violate the "pay over" requirement of that statute by willfully failing to pay over trust funds collected prior to his accession to control when at the time he assumed control the corporation has funds impressed with a trust under § 7501, but that § 7501 does not impress a trust on after-acquired funds, and that the responsible person consequently does not violate § 6672 by willfully using employer funds for purposes other than satisfaction of the trust-fund tax claims of the United States when at the time he assumed control there were no funds with which to satisfy the tax obligation and the funds thereafter generated are not directly traceable to collected taxes referred to by that statute.

Slodov v. United States, 436 U.S. 238, 259-60, 56 L. Ed. 2d 251, 98 S. Ct. 1778 (1978). The financial statements of CTC clearly demonstrate that, at the time plaintiff assumed control of the corporation in October, no funds were available in the corporate treasury with which to pay the trust fund taxes. It was just for the purpose of bringing cash to the company that plaintiff was first approached by those then operating the CTC business.

> Any funds generated by the business after plaintiff took charge . . . certainly cannot be said to be "directly traceable" to collected taxes. Plaintiff has established that he is not liable for the penalty assessment imposed upon him for the third quarter of 1976.

Kadah, 600 F.Supp. at 1311-12.

Because the Tenth Circuit's decision is contrary to controlling precedents, this Court should issue a writ of certiorari and reverse the decision.

III. Opinion Below Is Contrary to *Slodov's* Rationale.

As noted above this Court rejected the United States' argument that a trust should be imposed on funds acquired after Slodov gained control of the corporations because (1) no well-counseled person would attempt to save a company unless it already had sufficient monies to pay all tax delinquencies, which would discourage changes of ownership without encouraging compliance with the tax code, *Slodov*, 436 U.S. at 251-53; (2) such an interpretation would make responsible persons assuming control of a business a guarantor for payment of the delinquent tax debt without fault, contrary to the history and context of § 6672, *Slodov*, 436 U.S. at 253-55; and (3) the trust imposed by § 6672 cannot be read as establishing any fiduciary duty to pay over "after-acquired" cash unrelated to the withholding taxes, *Slodov*, 436 U.S. at 255-56. These rationales apply equally to the instant case.

It makes no difference to a prospective purchaser whether funds generated by his purchase of a corporation will be subject to a trust for back taxes under the Tenth Circuit's theory for

purchases in January or under the rejected theory in *Slodov* for purchases after January. The Tenth Circuit's rule would discourage changes of ownership without encouraging compliance with the tax code.

Further, the Tenth Circuit's interpretation makes responsible persons assuming control of a business a guarantor for payment of the delinquent tax debt without fault, contrary to the history and context of § 6672. There is no basis for finding fault in a person who purchases a corporation on January 15 and not in one who purchases on January 31, when all other conditions are equal.

Finally, the trust imposed by § 6672 cannot be read as establishing any fiduciary duty to pay over "after-acquired" cash unrelated to the withholding taxes. The statutes and the Court made clear that there must be a nexus between the funds collected for withholding taxes and the trust created, and that there is no obligation to pay over after-acquired cash unrelated to the withholding taxes. *Slodov*, 436 U.S. at 255-56. If a corporate officer was not an officer during the tax quarter, and did not participate in dissipating trust funds, he has no nexus with such funds. The due date for the payment is irrelevant to this determination.

Because the Tenth Circuit has failed to apply this Court's precedent by improperly distinguishing it, the Court should grant a writ of certiorari and reverse the decision.

CONCLUSION

The decision of the Tenth Circuit has erroneously distinguished and failed to apply applicable precedent of this

Court. In doing so, it is in conflict with every Court of Appeals decision discussing the application of this Court's precedent.

The Tenth Circuit's distinguishing of this Court's precedent raises an important federal question which needs to be resolved by this Court.

Respectfully submitted,

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APPENDIX A

DAVID A. STETTLER, LADEAN STETTLER, Plaintiffs-Counter-Defendants, v. UNITED STATES OF AMERICA, Defendant-Counter-Claimant, Third-Party Plaintiff-Appellee, v. LANE S. HOWELL, Third-Party Defendant-Appellant, JOHN T. DUNLOP, Third-Party Defendant.

No. 96-4211

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

1998 U.S. App. LEXIS 504; 98-1 U.S. Tax Cas. (CCH) P50,136; 81 A.F.T.R.2d 434

January 13, 1998, Filed

NOTICE: RULES OF THE TENTH CIRCUIT COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THIS CIRCUIT.

SUBSEQUENT HISTORY: Reported in Table Case Format at: *1998 U.S. App. LEXIS 3338.*

PRIOR HISTORY: (D. Utah). (D.C. No. 94-CV-136-S).

DISPOSITION: Judgment of the United States District Court for the District of Utah AFFIRMED.

COUNSEL: For UNITED STATES OF AMERICA, Defendant Counter-claimant, Third Party Plaintiff - Appellee: Charles E. Brookhart, Bruce R. Ellisen, United States Department of

Justice, Tax Division, Washington, DC. David J. Schwendiman, U.S. Attorney, Office of the United States Attorney, District of Utah, Salt Lake City, UT. William F. Colgin, United States Department of Justice, Trial Division, Washington, DC. Kirk C. Lusty, United States Department of Justice, Tax Division, Washington, DC. Carol A. Barthel, US Department of Justice, Tax Division, Washington, DC.

For LANE S. HOWELL, Third-Party-Defendant - Appellant: Lane S. Howell, Windermere, FL.

JUDGES: Before PORFILIO and LUCERO, Circuit Judges, and MARTEN, ** District Judge.

** The Honorable J. Thomas Marten, District Judge, United States District Court for the District of Kansas, sitting by designation.

OPINIONBY: JOHN C. PORFILIO

OPINION:

ORDER AND JUDGMENT *

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not

materially assist the determination of this appeal. See Fed. R. App. P. 34(a); 10th Cir. R. 34.1.9. The case is therefore ordered submitted without oral argument.

The Internal Revenue Code imposes personal liability upon an officer or employee of a business who fails to remit its employees' withheld income and FICA taxes (known as trust fund taxes) to the treasury. See *26 U.S.C. § 6672.* n1 "Specifically, the penalty under § 6672 can be assessed against any officer or employee of a corporation who: (1) is under a duty to collect, truthfully account for, and pay over any tax imposed by this title--i.e., a responsible person; and (2) willfully fails to do so." *Taylor v. IRS, 69 F.3d 411, 413 (10th Cir. 1995)* (quotations omitted).

n1 Section 6672(a) provides that:

> Any person required to collect, truthfully account for, and pay over any tax imposed by this title who willfully fails to collect such tax, or truthfully account for and pay over such tax, or willfully attempts in any manner to evade or defeat any such tax or the payment thereof, shall, in addition to other penalties provided by law, be liable to a penalty equal to the total amount of the tax evaded, or not collected, or not accounted for and paid over.
>
> Section 6671(b) defines "person" for purposes of § 6672 as "an officer or employee of a corporation . . . who . . . is under a duty to perform the act in respect of which the violation occurs."

Taxpayer Lane S. Howell, the president of Northern Outfitters, Inc., (Northern) during two separate periods in 1990,

appeals from a district court order granting summary judgment to the government and holding him liable for tax penalties under *26 U.S.C. § 6672.* We have jurisdiction under *28 U.S.C. § 158*(d). Because we agree with the district court that Howell was a responsible person who willfully failed to pay over the trust fund taxes, and because we find no infirmity in the assessment procedures used, we affirm.

The Internal Revenue Service made § 6672 penalty assessments against David Stettler, John T. Dunlop, and Howell. The assessments were made in connection with the failure to pay over the withholding tax liabilities of Northern for the fourth quarter of 1990. Stettler paid $5000 of the assessment and submitted a refund claim which was denied. Stettler and his wife then filed this refund suit in district court. The government filed counterclaims against Stettler for the unpaid balance of the assessment against him and filed third party complaints against Dunlop and Howell. All claims against Dunlop and Stettler were disposed of by stipulation. The district court then granted summary judgment in favor of the government and against Howell who appeals.

At all relevant times, John T. Dunlop was Northern's majority shareholder. He was also a majority shareholder in Bonnevest, Inc., a holding company for a number of Dunlop-owned companies. Bonnevest existed to provide management services and financial capitalization for the companies held by it. In 1989, Howell joined Bonnevest as a consultant, helping to manage the various smaller Bonnevest-held companies and providing management, marketing, and financial advice. As of December 1989, Howell was the executive vice president and chief operating officer of Bonnevest. He was also a Bonnevest director and shareholder. In his role as a consultant to

Bonnevest, Howell served two terms as president of Northern. During those terms, Howell continued to be paid, not by Northern, but by Bonnevest.

Howell's first term as Northern's president extended from February to May or June of 1990. While there may have been some late payroll tax payments during this period, there were no outstanding tax liabilities when Howell concluded his first term as Northern's president. David Stettler succeeded Howell as president of Northern but left the company in December 1990.

Sometime during January 1991, Howell again assumed the duties of Northern's president. n2 When he took over for this second time, Howell knew that Northern had not paid its payroll taxes for the fourth quarter of 1990. n3 Although there is no evidence of it in the record, Howell testified that Northern had reached an agreement with the IRS to pay back taxes. During Howell's second term as president, payroll taxes were kept current and payments were made toward the arrearage. By April of 1991, however, Northern's financial condition had deteriorated to the point that the company elected to file a Chapter 11 petition. Howell continued as Northern's president until February 1992, at which time he also parted company with Bonnevest.

n2 The second amended disclosure statement filed pursuant to Northern's eventual bankruptcy states that Howell had been president since January 1, 1991. Howell himself, however, variously testified that he took over in mid to late January.

n3 While the taxes were required to be collected during

the fourth quarter of 1990, they were not due to be remitted to the government until January 31, 1991. Howell testified that by the middle of the fourth quarter of 1990, Northern did not have enough money to meet its payroll and pay taxes too. He further testified that no funds were carried over from the fourth quarter of 1990 into 1991 in order to discharge the payroll tax liability.

On appeal, Howell identifies three issues warranting reversal. He contends he was not a "responsible party," he did not "willfully" fail to pay taxes for the fourth quarter of 1990, and that the assessment against him was untimely. Howell bears the burden of establishing either lack of responsibility or willfulness. See *Oliver v. United States, 921 F.2d 916, 919 (9th Cir. 1990).* As discussed below, he must also rebut the presumption of validity established by the assessment evidence presented by the government. See *Taylor, 69 F.3d at 419.*

Howell's first argument, that he was not a responsible person for § 6672 purposes, involves the application of law to fact and is accorded de novo review. See *Bradshaw v. United States, 83 F.3d 1175, 1178 (10th Cir. 1995).* The responsible person concept has generally been given broad interpretation by this and other courts, see id., and is not a matter of knowledge but one of status, duty, and authority, see *Mazo v. United States, 591 F.2d 1151, 1156 (5th Cir. 1979).*

A person is responsible within the meaning of the statute if that person is required to collect, truthfully account for or pay over any taxes withheld from the wages of a company's employees. The responsible person generally is, but need not be, a managing officer or employee, and there may be more than one responsible person. Indicia of responsibility include

the holding of corporate office, control over financial affairs, the authority to disburse corporate funds, stock ownership, and the ability to hire and fire employees. Among other things, therefore, a corporate officer or employee is responsible if he or she has significant, though not necessarily exclusive, authority in the "general management and fiscal decisionmaking of the corporation."

Denbo v. United States, 988 F.2d 1029, 1032 (10th Cir. 1993) (quotation and citations omitted).

Applying these criteria to the facts in the record, we find no error in the district court's conclusion that Howell was a responsible party. During Howell's second term as Northern's president, he had the authority to hire and fire, access to company books and records, and "some" control over company finances. Howell himself testified that he gave guidance to the firm accountant regarding which creditors to pay and had the authority to see that back taxes were paid. On his own authority, he directed the firm accountant not to pay more back taxes than had been laid down in Northern's base operating plan.

In making the responsible person determination, "the crucial inquiry is whether the person had the effective power to pay the taxes--that is, whether he had the actual authority or ability, in view of his status within the corporation, to pay the taxes owed." *Taylor, 69 F.3d at 416* (quotation omitted). By his own admissions, Howell had this power and was therefore a responsible person.

Howell argues that he had no day-to-day hand in running Northern's affairs during his second term as president. As we

explained in *Muck v. United States, 3 F.3d 1378, 1380-81 (10th Cir. 1993),* "a corporate officer or employee is responsible if he or she has significant, though not necessarily exclusive, authority in the general management and fiscal decisionmaking of the corporation. The existence of such authority, irrespective of whether that authority is actually exercised, is determinative." (quotations and citations omitted).

Nor does it help Howell that there may have been a payment plan agreed upon between the IRS and Northern. Such a plan would only absolve Howell of his personal liability if it specifically provided that he, individually, would be held harmless from the § 6672 penalty. See *id. at 1382.* Howell has introduced no evidence to that effect.

Finally, it is irrelevant that Howell may not have been a responsible party during the fourth quarter of 1990 when the taxes were to have been collected. The Supreme Court has construed the obligations of § 6672 in the disjunctive, refusing to limit the scope of § 6672 liability only to those persons who performed all three statutory duties: collecting, accounting for, and paying over. See *Slodov v. United States, 436 U.S. 238, 246-50, 56 L. Ed. 2d 251, 98 S. Ct. 1778 (1978).* Indeed, the petitioner in Slodov did not acquire the delinquent businesses until January 31, 1969, but was still held to be a responsible person for taxes withheld prior to that date. See *id. at 241, 251.*

Mr. Howell next argues that, even if he was a responsible person, he did not willfully fail to pay over payroll taxes. Willfulness is a question of fact. See *Bradshaw, 83 F.3d at 1183.* "We view the evidence in the light most favorable to the Government and we will not overturn the findings of the District Court unless they are clearly erroneous." *Burden v.*

United States, 486 F.2d 302, 304 (10th Cir. 1973). If a person has made a "voluntary, conscious and intentional decision to prefer other creditors over the Government," see *id. at 304,* he or she has acted willfully for purposes of the statute. No bad motive is required. Id.

The evidence establishes that Howell knew at the time he began his second term as president of Northern that the payroll taxes for the fourth quarter of 1990 had not been paid. He also knew, indeed he directed, that other creditors be paid while these outstanding taxes remained unpaid. "A responsible person's use of funds, or his knowledge of the use of funds for payments to other creditors after he is aware of the failure to pay the withholding tax, is willful conduct within the scope of Section 6672." *Garsky v. United States, 600 F.2d 86, 91 (7th Cir. 1979);* see also *Denbo, 988 F.2d at 1033-34.*

Howell argues against his result, citing *Slodov, 436 U.S. 238, 56 L. Ed. 2d 251, 98 S. Ct. 1778.* Slodov, however, is distinguishable from this case. In Slodov, the taxpayer purchased the stock and assumed the management of three businesses on January 31, 1969. The taxpayer knew that withholding taxes due on that date had not been paid, but he was assured by the sellers that sufficient funds remained in various business bank accounts to cover the tax liability. This was not the case. In fact, "at the time that petitioner assumed control, the corporations had no liquid assets, and whatever trust-fund taxes had been collected prior to petitioner's assumption of control had been dissipated." *Id. at 242.*

Dr. Slodov deposited personal funds into the businesses and, during the next few months, the corporations acquired sufficient funds to pay the delinquent taxes. Instead of

discharging the tax debt, however, petitioner used the funds to pay normal operating expenses. Under these circumstances the Court held that, "if new management of a corporation assumes control when a delinquency for trust fund taxes already exists and the withheld taxes have already been dissipated by prior management, the new management's use of after-acquired revenues to satisfy creditors other than the United States does not make it personally liable for a section 6672 penalty." *Denbo, 988 F.2d at 1035* (emphasis added; summarizing holding in *Slodov*).

Several facts distinguish this case from Slodov. First, when Howell took over as president of Northern, no delinquency for trust fund taxes existed. The taxes were not due until January 31, 1991; Howell assumed control before that date. Howell was thus not "new management" at a time that a tax delinquency already existed.

Nor was Northern without liquid assets with which to pay the taxes. Northern's balance sheet as of December 31, 1990, reveals a cash balance of $27,835.01. Cash on hand as of January 31, 1991, was $11,432.94. During January 1991, $93,000 was deposited in Northern's checking account. It is undisputed that this latter amount would have been enough to discharge the fourth quarter 1990 tax liability. Contrary to Howell's characterization, these were not "after-acquired" funds vis-a-vis Northern. These funds were acquired by Northern and available to it in time to avoid delinquency. The funds were not acquired after the delinquency arose. Unlike Dr. Slodov, Howell did not inherit a payroll tax fait accompli when he resumed duties as Northern's president. When he took over, Howell knew of the outstanding tax liability and had access to sufficient corporate funds to pay it in a timely fashion.

Had Howell assumed control after January 31, 1991, and had Northern been without any funds to satisfy the tax liability, Howell would be in a stronger position to claim the benefit of Slodov. Because neither of those scenarios were the case here, Slodov does not apply.

Howell finally argues that no timely assessment was made against him. The evidence is to the contrary. The record contains a copy of a certificate of assessments and payments (Form 4340). This form provided Howell with all of the information required under Treasury Regulation § 303.6203-1 and indicates that the date of assessment, or the "23c date," was February 9, 1994. n4 It therefore is presumptive proof that the assessment was valid. See *Taylor, 69 F.3d at 419.* In addition to Form 4340, the record also contains a copy of the summary record of assessments signed by an assessment officer on February 9, 1994. Howell has failed to advance any evidence in rebuttal.

n4 As the government explains in its brief at p. 36 n.15, the date of an assessment is commonly referred to as a 23c date because of the name of the form used in making assessments.

The judgment of the United States District Court for the District of Utah is AFFIRMED.

Entered for the Court

John C. Porfilio

Circuit Judge

APPENDIX B

DAVID A. STETTLER and LaDEAN STETTLER, Plaintiffs, vs. UNITED STATES OF AMERICA, Defendant and Counterclaim Plaintiff, vs. DAVID A. STETTLER; LANE S. HOWELL; and JOHN T. DUNLOP, Counterclaim Defendants.

Case No. 94-NC-0136-S

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH, NORTHERN DIVISION

1996 U.S. Dist. LEXIS 17948; 97-1 U.S. Tax Cas. (CCH) P50,107; 78 A.F.T.R.2d (P-H) 7484

November 15, 1996, FILED

DISPOSITION: United States' motion for summary judgment GRANTED. Howell's motion for summary judgment DENIED.

COUNSEL: For DAVID A. STETTLER, plaintiff: W. Kevin Jackson, Mr., SALT LAKE CITY, UT. For LADEAN STETTLER, plaintiff: W. Kevin Jackson, Mr., (See above).

For UNITED STATES OF AMERICA, defendant: Scott M. Matheson, Jr., US ATTORNEYS OFFICE - UTAH, Kirk C. Lusty, Mr., William F. Colgin, Jr, US DEPARTMENT OF JUSTICE, TAX DIVISION, WASHINGTON, DC.

For UNITED STATES OF AMERICA, third-party plaintiff: Scott M. Matheson, Jr., US ATTORNEYS OFFICE - UTAH, Kirk C. Lusty, Mr., William F. Colgin, Jr, US DEPARTMENT OF JUSTICE, TAX DIVISION, WASHINGTON, DC.

LANE S. HOWELL, third-party defendant, Pro se, SALT LAKE CITY, UT. For JOHN T. DUNLOP, third-party defendant: Douglas J Parry, Mr., James K. Tracy, PARRY MURRY & WARD, SALT LAKE CITY, UT.

For UNITED STATES OF AMERICA, counter-claimant: Scott M. Matheson, Jr., US ATTORNEYS OFFICE - UTAH, Kirk C. Lusty, Mr., William F. Colgin, Jr, US DEPARTMENT OF JUSTICE, TAX DIVISION, WASHINGTON, DC.

For DAVID A. STETTLER, counter-defendant: W. Kevin Jackson, Mr., SALT LAKE CITY, UT. For LADEAN STETTLER, counter-defendant: W. Kevin Jackson, Mr., (See above).

JUDGES: DAVID SAM, U.S. DISTRICT JUDGE

OPINIONBY: DAVID SAM

OPINION: MEMORANDUM DECISION

I. INTRODUCTION

Before the court are cross motions for summary judgment. By its motion counterclaim plaintiff United States of America seeks judgment against counterclaim defendant Lane S. Howell ("Howell") in the amount of $38,996.71, plus interest, for the unpaid trust fund recovery penalty assessed against Howell arising under section 6672 of the Internal Revenue Code, *26 U.S.C. § 6672,* for his willful failure to collect, truthfully account for and pay over the withheld income and FICA taxes of Northern Outfitters, Inc. ("Northern") for the fourth quarter of 1990. Howell, by his motion, seeks judgment that he is not

liable as asserted by the United States, recovery of penalties paid by him and release of tax liens filed against the residence of his wife.

II. SUMMARY JUDGMENT STANDARD

Under Fed. R. Civ. P. 56, summary judgment is proper only when the pleadings, affidavits, depositions or admissions establish there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. The burden of establishing the nonexistence of a genuine issue of material fact is on the moving party. n1 E.g., *Celotex Corp. v. Catrett, 477 U.S. 317, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986).* This burden has two distinct components: an initial burden of production on the moving party, which burden when satisfied shifts to the nonmoving party, and an ultimate burden of persuasion, which always remains on the moving party. See 10A C. Wright, A. Miller & M. Kane, Federal Practice and Procedure § 2727 (2d ed. 1983).

n1 Whether a fact is material is determined by looking to relevant substantive law. *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986).*

When summary judgment is sought, the movant bears the initial responsibility of informing the court of the basis for his motion and identifying those portions of the record and affidavits, if any, he believes demonstrate the absence of a genuine issue of material fact. *Celotex, 477 U.S. at 323.* In a case where a party moves for summary judgment on an issue on which he would not bear the burden of persuasion at trial, his initial burden of production may be satisfied by showing the court there is an absence of evidence in the record to support

the nonmovant's case. n2 *Id., 477 U.S. at 323.* "There can be no issue as to any material fact . . . [when] a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." Id.

n2 In his dissent in *Celotex*, Justice Brennan discussed the mechanics for discharging the initial burden of production when the moving party seeks summary judgment on the ground the nonmoving party--who will bear the burden of persuasion at trial--has no evidence:

> Plainly, a conclusory assertion that the nonmoving party has no evidence is insufficient. Such a 'burden' of production is no burden at all and would simply permit summary judgment procedure to be converted into a tool for harassment. Rather, as the Court confirms, a party who moves for summary judgment on the ground that the nonmoving party has no evidence must affirmatively show the absence of evidence in the record. This may require the moving party to depose the nonmoving party's witnesses or to establish the inadequacy of documentary evidence. If there is literally no evidence in the record, the moving party may demonstrate this by reviewing for the court the admissions, interrogatories and other exchanges between the parties that are in the record. Either way, however, the moving party must affirmatively demonstrate that there is no evidence in the record to support a judgment for the nonmoving party.

477 U.S. at 323 (citations omitted).

Once the moving party has met this initial burden of production, the burden shifts to the nonmoving party to designate "specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e); *Celotex, 477 U.S. at 324.*

> If the defendant in a run-of-the-mill civil case moves for summary judgment . . . based on the lack of proof of a material fact, the judge must ask himself not whether he thinks the evidence unmistakably favors one side or the other, but whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented. The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff. The judge's inquiry, therefore, unavoidably asks whether reasonable jurors could find by a preponderance of the evidence that the plaintiff is entitled to a verdict . . . .

Liberty Lobby, 477 U.S. at 252. The central inquiry is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Id.* If the nonmoving party cannot muster sufficient evidence to make out a triable issue of fact on his claim, a trial would be useless and the moving party is entitled to summary judgment as a matter of law. *Id., 477 U.S. 242.*

III. DISCUSSION

It is uncontroverted that during the fourth quarter of 1990, Northern failed to withhold FICA contributions and federal income taxes from its employees' wages and/or to remit the

same to the Internal Revenue Service ("IRS"). Section 6672 of the Internal Revenue Code provides that when a person required to collect, account for, and pay over withholding taxes willfully fails to do so, he is personally liable for a penalty equal to the amount of the unpaid taxes. Section 6672 imposes liability on an individual if two requirements are met: (1) the person must be a "responsible person" and (2) the person must act "willfully" in not paying over the taxes. *Muck v. United States, 3 F.3d 1378, 1380 (10th Cir. 1993); Burden v. United States, 486 F.2d 302, 304 (10th Cir. 1973),* cert. denied, *416 U.S. 904, 40 L. Ed. 2d 109, 94 S. Ct. 1608 (1974).* On February 9, 1994, a delegate of the Secretary of the Treasurer made an assessment against Howell of the liability arising under § 6672 of the Internal Revenue Code in the amount of $38,996.71 for his willful failure to collect, truthfully account for, and pay over the withheld income and FICA taxes of Northern for the fourth quarter of 1990.

Assessment

Howell claims that the IRS failed to follow proper assessment procedures as required by Internal Revenue Code sections 6203, 6303 and Treasury Regulation 302.6203-1 and, thus, no valid assessment was made against him.

Section 6303 of the Internal Revenue Code, *26 U.S.C. § 6303,* governing notice and demand for unpaid taxes applies to administrative proceedings for collection of taxes and does not preclude a civil action to collect unpaid taxes. *United States v. McCallum, 970 F.2d 66 (5th Cir. 1992).* The action before the court is civil in nature.

Section 6203 of the Internal Revenue Code, *26 U.S.C.A. §*

6203, provides as follows:

> The assessment shall be made by recording the liability of the taxpayer in the office of the Secretary [of the Treasurer] in accordance with rules or regulations prescribed by the Secretary. Upon request of the taxpayer, the Secretary shall furnish the taxpayer a copy of the record of the assessment.

The Treasury regulations further elaborate:

> The assessment shall be made by an assessment officer signing the summary record of assessment. The summary record, through supporting records, shall provide identification of the taxpayer, the character of the liability assessed, the taxable period, if applicable, and the amount of the assessment . . . . The date of the assessment is the date the summary record is signed by an assessment officer. If the taxpayer requests a copy of the record of assessment, he shall be furnished a copy of the pertinent parts of the assessment which set forth the name of the taxpayer, the date of assessment, the character of the liability assessed, the taxable period, if applicable, and the amounts assessed.

26 C.F.R. § 301.6203-1.

Howell appears to complain that the Form 4340 Certificate of Assessments and Payments was not timely provided pursuant to a § 6203 request until he filed his motion for summary judgment and that the information provided him by the IRS pursuant to a Freedom of Information Act request was inadequate to establish a valid assessment. However, Howell

has presented no viable evidence that he made a § 6203 request nor that the IRS failed to comply. He, therefore, has failed to carry his burden of proof on the issue. The record before the court reflects that the IRS provided Howell with a Summary of Record of Assessments dated February 9, 1994, and a Form 4340, Certificate of Assessments and Payments for Lane S. Howell dated May 29, 1996. "The notice required by the Regulations mandates that the supporting documents identify the taxpayer, establish the nature of the tax liabilities, the period of those liabilities, the date of assessment, and the amount to be assessed. See 26 C.F.R. § 301.6203-1." *Gentry v. United States, 962 F.2d 555, 557 (6th Cir. 1992).* The Regulations do not require the information be in any exact or specific form. Id. It appears to the court that the Form 4340, Certificate of Assessments and Payments provides the information required by I.R.C. § 6203 and Treas. Reg. § 301.6203-1. "Certificates of assessments and payments are generally regarded as being sufficient proof, in the absence of evidence to the contrary, of the adequacy and propriety of notices and assessment that have been made. Id.

Responsible person

The corporate officer or employee is responsible "if he or she has significant, though not necessarily exclusive, authority in the 'general management and fiscal decision of the corporation'." *Denbo v. United States, 988 F.2d 1029, 1032 (10th Cir. 1993)* (quoting *Kizzier v. United States, 598 F.2d 1128, 1132 (8th Cir. 1989); Muck v. United States, 3 F.3d 1378, 1381 (10th Cir. 1993).* "Indicia of responsibility include the holding of corporate office, control over financial affairs, the authority to disburse corporate funds, stock ownership, and the ability to hire and fire employees." *Denbo, 988 F.2d at*

1032; Jay v. United States, 865 F.2d 1175, 1179 (10th Cir. 1989). A person in control of a corporation is under a duty to pay over the unpaid withholding taxes along with the return showing the taxes due. *26 U.S.C. 6151*(a); *Brown v. United States, 591 F.2d 1136, 1140 (5th Cir. 1979).* A person who fails to do so is the responsible person for the purposes of a trust fund recovery penalty assessed under § 6672. Id.

Howell was employed by Bonnevest, Inc. ("Bonnevest") as a consultant during the period of January 1990 through February 1992. Bonnevest was a related company to Northern. Howell also was president of Northern from February through May of 1990. He was a director of Northern from the spring of 1990 until February 1992. At some point in mid January, 1991, Howell resumed his position as president of Northern and continued in that position until February of 1992. When Howell resumed his position as president in January of 1991, he was aware of Northern's unpaid taxes and exercised some control over the financial affairs of Northern including the authority to direct the funds of Northern, although he states that he did not participate in the day to day activities of Northern. Northern filed its Form 941 for the third quarter of 1991 when due on January 31, 1991, but without payment. Northern continued to pay other creditors. During the month of January 1991, a total of $93,000 was deposited in Northern's payroll account.

Howell asserts that he had no authority, association or control over the business operations of Northern during the period of June through December 1990 and into January 1991, including no responsibility for or control over Northern's bank accounts. He acknowledges that from mid to late January 1991 he assumed the title of president of Northern to assist in evaluating the necessity of filing a petition in bankruptcy, but

that existing management continued to operate the business.

However, the record reflects and Howell admits, that from approximately mid January 1991 until February 1992, he again served as president of Northern, that he was a director of Northern, and that he had some financial control over the financial affairs of Northern, including the ability to hire and fire employees, access to the books and records, and the authority to direct disbursements of funds. He provided guidance as to which creditors to pay and which creditors not to pay. He specifically acknowledges that, when he again became acting president in mid January 1991, he had authority to make sure that Northern's taxes were paid. The court, therefore, concludes that Howell was a responsible person on January 31, 1991 when the 1990 fourth quarter return was filed without payment. "That [Howell] was not a responsible person at the time that the portion of the liability accrued does not relieve him from responsibility for paying over the tax when it became due." *Saderup v. United States, 80-2 USTC P 9526 (D. Utah 1980); Brown v. United States, 591 F.2d 1136 (5th Cir. 1979).*

Willfulness

Willfulness within the meaning of § 6672 is shown by a "'voluntary, conscious and intentional decision to prefer other creditors over the government'" *Denbo 988 F.2d at 1033,* quoting *Burden, 486 F.2d at 304.* See also *Smith v. United States, 894 F.2d 1549, 1553 (11th Cir. 1990)* ("the willfulness requirement of section 6672 is satisfied if there is evidence that the responsible officer had knowledge of payments to other creditors after he was aware of the failure to remit withholding taxes"). "Proof of willfulness does not require proof of bad

motive . . . . It is the burden of the responsible person to show that he did not willfully fail to remit taxes." *Muck, 3 F.3d at 1381.*

Howell acknowledges that, when he resumed the presidency of Northern in mid January, 1991, he was aware that taxes for the fourth quarter of 1990 were unpaid. He admits that he "directed Bret Woods of Northern's management to set up a payment plan with the IRS, and to insure that all current payroll taxes were remitted promptly." Affidavit of Lane S. Howell, P 13. Howell also acknowledges that the 1990 fourth quarter taxes were not paid in full, while other creditors received payment. In short, the record reflects that Howell knew of the unpaid tax liability yet allowed Northern to continue operations and that he directed payment to suppliers and other creditors, thus, avoiding payment of taxes due on January 31, 1991. Therefore, the court concludes that Howell acted wilfully for purposes of § 6672.

IV. CONCLUSION

For the foregoing reasons, the court finds that Howell was a responsible person who wilfully failed to collect, truthfully account for, or pay over the taxes withheld from the employees of Northern for the quarter ending December 31, 1990. Accordingly, the United States' motion for summary judgment is GRANTED. Howell's motion for summary judgment is DENIED.

DATED this 14th day of November, 1996.

BY THE COURT:
DAVID SAM
U.S. DISTRICT JUDGE

JUDGMENT IN A CIVIL CASE

This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

that judgment be entered in favor of the United States against counterclaim defendant Lane S. Howell in the amount of $38,996.71 plus interest for the unpaid trust fund recovery penalty assessed for his willful failure to account for and pay over the withheld income and FICA taxes of Northern Outfitters, Inc for the fourth quarter of 1990.

November 18, 1996
Date

Markus B. Zimmer
Clerk